The Law Commission

Working Paper No 59

Contribution

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The Law Commission would be grateful for comments on this Working Paper before 1 December 1975.

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THE LAW COMMISSION

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PART I - INTRODUCTION

1. On 12 July 1972 The Law Society and the General Council of the Bar submitted a memorandum to us in which they drew our attention to a variety of legal problems that seemed to call for law reform, including the following:-

> "Co-contractors and co-tortfeasors may claim contribution from one another but not where each of the two (for example architect and builder) is liable for breach of his separate contract. An extension of Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 could be made."

2. In our First Programme[1] we had recommended in Item I "an examination of the law of contract, quasi-contract, and such other topics as may appear in the course of the examination to be inseparably connected with them...." This item covered the problem referred to us and we therefore initiated a study of contribution rights in respect of contractual liability and under section 6 of the Law Reform (Married Women and Tortfeasors) 1935 Act[2]; in the remainder of this paper we shall refer to this Act as 'the 1935 Act'. We are extremely grateful to Mr J.M. Evans, Lecturer in Law at the London School of Economics and Political Science, for his help in preparing this paper.

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1. (1965) Law Com. No. 1.
2. Seventh Annual Report (1972), Law Com. No. 50, para. 52; Eighth Annual Report (1973), Law Com. No. 58, para. 58; Ninth Annual Report (1974), Law Com. No. 64, para. 41.

3. The present law of contribution can be conveniently divided into two. One part is made up of contract, quasi-contract and rules of equity: it is judge-made law, although some aspects of it have been incorporated into codifying legislation[3], and we will, for convenience, refer to it as the 'common law' part. The other part came into existence with the introduction of statutory rights of contribution between tortfeasors under section 6 of the 1935 Act. The full text of the section is set out in the Appendix to this paper.

4. In their proposal The Law Society and the Bar Council point to a particular situation in which rights of contribution do not exist at common law and are not conferred by section 6 of the 1935 Act. They have succeeded in reducing their proposal to two sentences but as this is a part of the law with which some readers may not be familiar we shall make some preliminary observations on each of the four propositions that are contained in their proposal.

"Co-contractors ... may claim contribution from one another"

5. Two persons may be jointly liable on the same contract: they are then properly called co-contractors and each may claim a contribution from the other if he is called on to pay more than his fair share. For example, if a landlord grants a tenancy to two people jointly they are jointly liable for the rent as co-contractors. The landlord is entitled to enforce his claim for rent against either - although not to obtain his money twice over - and so one of the two may be required to pay for the other as well as for himself. The one who pays has however a common law right to claim a contribution from his co-contractor and the court thus has power to redistribute the burden between them in this situation.

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3. See, for example, sections 32 and 80 of the Marine Insurance Act 1906.

6. From the example just given it will be seen that at least three people are involved in even the simplest contribution problem. There is the creditor or plaintiff, whom we shall abbreviate to P, and there the two debtors or defendants, D1 and D2. In the rest of this paper we will use "D1" to mean the person claiming the contribution and "D2" to mean the person from whom it is claimed. This is not to say that contribution claims cannot be made where there are more than two defendants: they can, but the principles are the same as when there are only two. In an effort to keep our treatment of a complicated part of the law as simple as possible we propose to concentrate on contribution claims in which no more than one plaintiff and two defendants are involved.

"...co-tortfeasors may claim contribution from one another"

7. There were at common law a few situations in which one tortfeasor could claim a contribution from another tortfeasor but the general rule was that such claims could not be made "because of the underlying proposition that no man can claim damages when the root of the damage which he claims is his own wrong"[4]. This was very unsatisfactory. It meant that although D1 and D2 might have injured P by their negligence and have been equally at fault, one of them might have to bear the full cost of the claim and the other none. For example if P were injured when travelling as a passenger in a vehicle driven by D1 he might be able to prove negligence against D1 and also against another driver, D2, but if P were to exact compensation from D1 alone there would have been no way in which D1 could get a contribution from D2. In 1934 the Law Revision Committee considered "the doctrine of no contribution between tort-feasors" and reported[5] that it should be altered "as speedily as possible". In the following year, by section 6 of the 1935 Act, the courts were given jurisdiction to order one of two tortfeasors to make

4. Per Lord Dunedin, Weld-Blundell v. Stephens [1920] A.C. 956, 976. This rule is sometimes called the rule in Merryweather v. Nixan (1799) 8 T.R. 186.

5. Third Interim Report, Cmd. 4637, para. 7.

such contribution towards the damages that the other had to pay as might be "just and equitable having regard to the extent of that person's responsibility for the damage". The courts were further empowered, in appropriate cases, to exempt the less culpable tortfeasor from an obligation to contribute to anything that the other might be called on to pay to the plaintiff and, conversely, to order the other to make a contribution amounting to a complete indemnity[6].

"Where each of the two (for example architect and builder) is liable for breach of his separate contract [no contribution may be claimed]"

8. At common law a contractor cannot claim a contribution from another contractor except where each is bound to the plaintiff by the same contractual obligation, and the 1935 Act does not apply to contractors at all. A factual situation that illustrates this gap in the law and which concerns an architect and a builder was the subject of a decision of the Court of Appeal of Northern Ireland in 1957. Section 16(1)(c) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 is to the same effect as section 6(1)(c) of the 1935 Act and in McConnell v. Lynch-Robinson[7] the court had to decide whether by virtue of section 16(1)(c) an architect should have leave to claim a contribution from a builder on the assumption that the following facts were proved:-

(a) That P had engaged the architect, D1, to draw plans and to supervise some building work at P's home in accordance with the plans.

(b) That, by a separate contract, P had engaged a builder, D2, to do the building work in accordance with the plans and subject to the supervision of D1.

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6. For examples see Whitby v. Burt Boulton and Hayward Ltd. [1947] K.B. 918 and Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555.

7. [1957] N.I. 70.

(c) That D2 in breach of his contract put a damp-course in the wrong place and D1 in breach of his contract failed to notice the error and to see that it was put right.

(d) That P had incurred expenses in having the error put right by a third party and had a sustainable claim in damages against D1 and D2.

9. In P's action against D1 the Court of Appeal of Northern Ireland were unanimously of the view that since the liability of D1 and D2 lay in contract not in tort[8] the court had no jurisdiction to entertain a contribution claim and so the application by D1 for leave to make a claim against D2 by third party proceedings was refused. There is no reason to suppose that the point would have been decided differently if considered by an appellate court in England.

"An extension of Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 could be made"

10. The specific point put to us by The Law Society and the General Council of the Bar was that section 6 of the 1935 Act could be altered so as to allow contribution claims not only between tortfeasors, as it does at present, but also between several contractors. We have considered this particular proposal in this paper. However, since we have a general obligation to see that anomalies are eliminated and that the law is simplified and modernised, we have decided to consider the reform of section 6 in a wider context. We have therefore looked at the whole of the present law of contribution in order to discover

(a) whether the McConnell v. Lynch-Robinson[9] problem is an isolated anomaly or whether there are other situations in which no rights of contribution exist either at common law or under the 1935 Act,

8. cf. Bagot v. Stevens Scanlan & Co. Ltd. [1966] 1 Q.B. 197.
9. [1957] N.I. 70.

(b) whether the law of contribution works satisfactorily in the situation in which rights of contribution do exist at common law,

(c) whether section 6 of the 1935 Act works satisfactorily in relation to contribution claims between tortfeasors, and

(d) whether there are any other isolated defects in the law of contribution that could be cured by an extension of section 6.

11. We have considered recommendations and criticisms of the present law of contribution that have been made by Professor Glanville Williams Q.C. in his books Joint Obligations[10] and Joint Torts and Contributory Negligence - A Study of Concurrent Fault[11] and we have studied an enactment of the Republic of Ireland entitled the Civil Liability Act 1961 which embodies many of the suggestions made by Professor Glanville Williams in his writings. The Civil Liability Act 1961, which, to prevent confusion, we will refer to in the rest of this paper as "the Irish Act", deals with the whole subject of "Proceedings against and Contribution between Concurrent Wrongdoers" in Part III and it has been of the greatest help to us as its provisions highlight the apparent deficiencies in our own law. We have however not taken it, in this paper, as a pattern from which to build an entirely fresh law of contribution, for the following reasons:-

(a) Many of the provisions in Part III of the Irish Act are concerned with procedural problems that are dealt with in a different way by Rules of Court in England.

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10. Published in 1949.

11. Published in 1951.

(b) Some of the provisions on contributory negligence differ from the provisions of English law, and contribution and contributory negligence are dealt with together. Our provisional view is that they should be dealt with separately and that the reform of the law of contributory negligence raises questions of principle which are largely irrelevant to the present study.

(c) Contribution between tortfeasors is already provided for in section 6 of the 1935 Act[12]. It seems more convenient to use this section as a basis than to make a completely fresh start.

(d) In some respects the provisions of Part III of the Irish Act appear to improve the contribution rights of a defendant at the expense of the plaintiff. Sections 35(1)(g), 35(1)(h), 35(1)(i) and 35(1)(j) each give the plaintiff a less satisfactory remedy against one of two defendants than he would have had against that defendant had the other not existed. Our provisional view is that any change in the law of contribution that reduced the present rights of the plaintiff would be retrograde. A similar view was expressed in the paragraph with which the Law Revision Committee concluded their proposals for allowing contribution rights between tortfeasors[13].

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12. Its full text is reproduced in the Appendix.

13. Third Interim Report, Cmd. 4637, para. 12. "We suggest that in any amendment it should be made clear that the plaintiff is not to be obliged to sue more than one joint tort-feasor, and is still to be entitled to recover the whole of his damages from anyone of the joint tort-feasors."

12. It is for consideration whether the provisions of the Irish Act would work more fairly if adopted into English law than would the provisional proposals with which we conclude this paper. In order that the reader may see how the Irish Act deals with those parts of the English law that seem to us unsatisfactory we have referred to the relevant provision in the Irish Act at every convenient point, sometimes in the main text and sometimes by footnote.

13. The rest of this paper is divided up as follows:-

Part II

In this part we set out the common law[14] relating to contribution, with the aim of exposing the particular areas in which some reform seems to be needed.

Part III

Here we consider section 6 of the 1935 Act, and examine its apparent deficiencies.

Part IV

Finally we consider the changes that might be made in section 6 of the 1935 Act having regard to the apparent defects in the common law (Part II) and in the 1935 Act (Part III). Our provisional recommendations are set out in summary at the end of the paper.

PART II - THE COMMON LAW

14. The part of the law of contribution that we decided to call the 'common law' part is made up of contract, quasi-contract and rules of equity. Since it has not been reduced into statutory form[15] its content and juridical basis must be extracted

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14. See para. 3 above.

15. Except in very minor instances such as in the Marine Insurance Act 1906, ss. 32 and 80.

from judgments given in decided cases. These show that contribution claims at common law fall into one of the following three categories:-

(a) The claim for a contribution that is based on contract;

(b) The claim for a contribution amounting to a total indemnity that is based not on contract but on quasi-contract or equity;

(c) The claim for a contribution, falling short of a total indemnity, that is based not on contract but on quasi-contract or equity.

The claim in contract

15. A contractual right of indemnity or contribution may be provided by a term in a contract that is primarily concerned with something else, such as the hire of machinery or plant[16]. It may, on the other hand, be the gist of the contract itself, as in the case of a policy of insurance that covers the insured against third party claims. In either case the success or failure of the claim must depend on the terms of the particular contract.

The claim in quasi-contract or equity for an indemnity

16. Where two people are liable for the payment of the same debt but the liability of one is 'primary' and the liability of the other is 'secondary', the person who is primarily liable may be ordered to indemnity the other. The classic example is the contract of guarantee. D1 makes a contract with P whereby he guarantees D2's payment of a debt owed to P; D2 defaults so D1 has to pay: D1 may then claim to be indemnified by D2. It

16. See for instance Arthur White (Contractors) Ltd. v. Tarmac Civil Engineering Ltd. [1967] 1 W.L.R. 1508.

was explained by Lord Wright in Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.[17] in the following way:-

> "The essence of the rule is that there is a liability for the same debt resting on the plaintiff[18] and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff."

17. The scope of this right of indemnity is not certain, but it is not limited to situations in which D1 and D2 are co-contractors, nor is it limited to cases of debt, as opposed to damages. Both points are illustrated by Moule v. Garrett[19]. In that case D1 was the lessee of premises and assigned the lease to someone else who had in turn assigned it to D2. By the terms of the lease D1 was liable to keep the premises in good repair and D2, being the assignee in possession, was under the same liability[20]. The lessor, P, recovered damages from D1 for failure to repair and D1 sought an indemnity from D2. Cockburn C.J. after holding that D2 was bound to indemnify D1 for another reason went on as follows:-[21]

> "Another ground on which the judgment below may be upheld, and, as I think, a preferable one, is that, the premises which are the subject of the lease being in the possession of the defendants as ultimate assignees, they were the parties whose duty it was to perform the covenants which were to be performed upon and in respect of those premises. It was their immediate duty to keep in repair, and by their default the lessee, though he had parted with the estate, became liable to make good to the lessor the conditions of the lease. The damage therefore arises through their default, and the general proposition applicable to such a case as the present is, that where one person is compelled to pay damages by the legal default of another, he is entitled to

17. [1937] 1 K.B. 534, 544.

18. To put the quotation into the terms adopted for this paper, "D1" should be substituted for "plaintiff" and "D2" for "defendant".

19. (1872) L.R. 7 Ex. 101.

20. As there was privity of estate between himself and the lessor, P.

21. (1872) L.R. 7 Ex. 101, 103-4 (emphasis added).

recover from the person by whose default the damage was occasioned the sum so paid."

18. The "general proposition" seems to have been too widely stated. It is doubtful whether it can be relied on where the obligation owed to P by D1 differs from the obligation owed by D2[22], and it is clear that it cannot be invoked except where D1 has conferred a benefit on D2[23]. For example,

> P, on the advice of a bank, D1, lends money to D2. The money is not repaid by D2 when it falls due. P sues D1 for advising him negligently[24] and is awarded damages which D1 pays.

If D2 were subsequently to come into money, would D1 be able to recover an indemnity from D2? Our conclusion is that although the wording of the "general proposition" in Moule v. Garrett[25] might seem to apply, the claim for an indemnity would be dismissed because D1's payment of the damages would not reduce or extinguish D2's debt so as to confer a benefit upon him. In practice no doubt D1 would purchase an assignment from P of D2's debt and would then be able to sue D2 by virtue of the assignment.

The claim in quasi-contract or equity for a contribution short of a total indemnity

19. Where D1 claims not an indemnity but a contribution, he must show that he and D2 were liable for the payment of the same debt, that he, D1, has paid more than his 'fair share' of

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22. Bonner v. Tottenham and Edmonton Permanent Building Society [1899] 1 Q.B. 161, 173 per Vaughan-Williams L.J. The decision of Slade J. in Metropolitan Police District Receiver v. Croydon Corporation [1956] 1 W.L.R. 1113 to the contrary effect was reversed by the Court of Appeal on another, but related, point: [1957] 2 Q.B. 154.

23. See the dictum of Lord Wright in the Brook's Wharf case at para. 16 above.

24. For the purpose of the example it does not matter whether the liability is in contract or in tort although liability in tort might lead to further difficulties because of the rule in Merryweather v. Nixan (1799) 8 T.R. 186. See para. 7 above.

25. (1872) L.R. Ex. 101, 103-4. See para. 17 above.

the debt and that D2 has benefited thereby. In Whitham v. Bullock[26] the Court of Appeal approved the following statement as a fair summary of the court's role in such cases:-

> "If, as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a certain way, the Court will so far as possible, having regard to the solvency of the different parties, see that, if that burden is placed inequitably by the exercise of the legal right, its incidence should be afterwards readjusted."27

20. The rules for dividing the loss up into shares are fully considered by Professor Glanville Williams Q.C. in his book Joint Obligations[28] but we do not propose to examine them in detail in this paper. The general principle is that, unless there has been an agreement to the contrary, the loss is to be shared equally between all the persons liable to the same demand, and so far as debts are concerned this seems to us to be reasonably satisfactory. So far as damages[29] are concerned however the position is, arguably, less satisfactory. If, for example, D1 and D2 are jointly liable to P for a breach of contract it is not always fair that the burden of the damages should fall on D1 and D2 equally. One of them may have been more to blame than the other but each may have been to blame in part; yet it seems from decided cases[30] that the court will either require the more culpable party to bear all the loss without any right of contribution or will divide the loss equally. Our provisional view is that the court should be enabled to apportion the burden with greater flexibility, having regard to the part played by each defendant in the circumstances founding the claim against

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26. [1939] 2 K.B. 81, 85.

27. This passage was taken from Rowlatt, Principal and Surety (3rd ed., 1936) p. 173.

28. In chapter 9.

29. By 'damages' we mean sums for which a party in breach of contract is liable including sums payable under a 'pre-estimate of damage' clause.

30. See, for example, Bahin v. Hughes (1886) 31 Ch. D. 390.

him. The court now has that power in relation to claims for damages in tort, by virtue of section 6 of the 1935 Act, and it is for consideration whether it should not also have that power in relation to claims for breach of contract, breach of trust or other breaches of duty.

21. The common law rules for dividing the loss cannot be invoked unless D1 and D2 are "equally liable at law to the same demand", but co-contractors are not the only persons who satisfy this requirement. Contribution claims may also be made between co-sureties[31] co-executors and co-trustees. The major gap in the common law of contribution is that the court cannot apportion the loss between two defendants unless each is liable to the same demand. The difficulty that faced the architect in McConnell v. Lynch-Robinson[32] was that the obligation that he was alleged to have broken was not the same as the obligation that the builder was alleged to have broken: he was thus unable to claim a contribution at common law and had to argue that the breaches of duty were tortious in character in an attempt to bring his claim within the statutory provisions for contribution between tortfeasors. If he and the builder had, by their respective acts of carelessness, caused injury to a third party, instead of defects in the contracting-owner's house, they would each have been tortfeasors and the statutory provisions would have applied. There is no obvious policy reason for allowing the architect a right of contribution in one case but not the other and our provisional view is that a person liable for a breach of contract should, for the purposes of the law of contribution, be in no worse position than a tortfeasor.

22. The gap in the law of contribution which is illustrated by the decision in McConnell v. Lynch-Robinson does not only work injustice between separate contractors. A similar problem

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31. Deering v. Earl of Winchelsea (1787) 2 Bos. & Pul. 270. In this case D1 and D2 were guaranteeing the same debt under separate agreements entered into at different times.

32. [1957] N.I. 70.

can arise where one defendant is liable in contract and the other in tort. For example:-

(a) P's house starts to fall down and he discovers that two people are to blame. One is the architect, D1, whom he engaged on a contract and the other is the local authority, D2, which is liable in tort for the negligence of its building inspector[33].

(b) P buys a car from D1 which has a latent defect in its electrical system. As he is driving it one night the headlights suddenly go out and he runs into an obstruction in the highway that D2 has negligently left unlit.

23. In these examples D1, if held liable in contract to P, has no right to claim a contribution from D2 at common law, nor under the 1935 Act because section 6 only applies where D1 and D2 are each liable as tortfeasors.

Release by judgment

24. There is one final problem in the common law of contribution that was not attended to in the legislation of 1935. It concerns the common law doctrine that where two persons are jointly liable for the payment of a debt or damages a judgment against one, although unsatisfied, releases the other from his obligation[34]. In so far as this rule related to joint tortfeasors it was abolished by sections 6(1)(a) and 6(1)(b) of the 1935 Act. The Law Revision Committee, in recommending the reversal of the common law rule in relation to joint tortfeasors, added[35] "If this meets with approval it may be desirable in the future to apply the same rules to actions against joint contractors". Our provisional view is that it is time

33. The liability of the local authority was considered in Dutton v. Bognor Regis U.D.C. [1972] 1 Q.B. 373.

34. King v. Hoare (1844) 13 M. & W. 494.

35. Third Interim Report, Cmd. 4637, para. 11.

that these provisions were extended to apply to judgments against one of two joint contractors as they apply at present to judgments against one of two joint tortfeasors[36].

PART III - CONTRIBUTION BETWEEN TORTFEASORS

25. Such very limited rights of contribution between tortfeasors as existed at common law are of less relevance since the passing of the 1935 Act, and our main purpose in this part of the paper is to consider whether the Act is working reasonably satisfactorily, or whether it needs reform. The full text of the relevant section appears in the Appendix but the kernel of it is in the following words:-

> "Where damage is suffered by any person as a result of a tort ... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage."

"Any tortfeasor liable in respect of that damage"

26. Section 6 of the 1935 Act, by requiring that the claimant D1 must be "liable in respect of that damage", gives only limited assistance to the defendant who settles the claim made against him out of court. The problem was exposed in a recent decision of the Court of Appeal in Stott v. West Yorkshire Road Car Co. Ltd.[37] the facts of which were as follows:-

> P had an accident when riding on his motorbicycle. He collided with D1's vehicle which was, he alleged, travelling towards him on the wrong side of the road. D1 denied liability but claimed a contribution from D2 whose vehicle had been so dangerously parked (D1 alleged) that D1 was obliged to pull out past it and into P's path. P

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36. Both situations are covered in The Irish Act by sections 18(1)(a), 18(1)(b) and 18(2).

37. [1971] 2 Q.B. 651.

settled his claim against D1 out of court for £10,000, it being stated in the settlement that D1's liability was not admitted. The question that the court had to decide was whether D1 could proceed thereafter with his claim against D2 for a contribution towards the £10,000.

27. The court held that D1 could claim a contribution but that he would not only have to prove that D2 was liable to P and that the sum of £10,000 was not excessive, but also that he himself would have been found liable if the claim had not been settled.

28. It is no doubt right that D2 should in such proceedings have the right to challenge the amount of the settlement and also to contest his own liability but it is less clear that he should be allowed to defeat a claim for contribution by arguing that D1 had settled a claim for which he was not liable. There are three respects in which this may seem unsatisfactory. The first is that it means turning all the usual conventions of civil claims upside down; D1 has to call evidence that is in the possession of P in order to establish his own liability in tort, and D2 then calls D1's witnesses in order to raise a doubt as to D1's liability. The second is that if the result of the contribution proceedings on the facts of Stott's case - were that the liability of D2 was established but that the liability of D1 was not, the person who made the compromise, D1, would get no contribution towards the £10,000 although he was not in fact to blame, and D2 who really was to blame would have to pay nothing at all. The third reason is that defendants may be deterred from compromising claims in which liability is in doubt if their right of contribution is thereby put at risk. Salmon L.J. said in Stott's case[38] that it would be very unfortunate if a defendant were obliged to

38. [1971] 2 Q.B. 651, 658-659.

fight a case to judgment in order to protect his contribution rights, and we think that the third reason is the most important of the three. Our provisional view is that a person who has compromised a claim made against him so as to benefit some other possible defendant should have the right to claim a contribution from that other defendant provided that the other defendant can be shown to be liable, and that it should not be an answer to such a claim that the person who settled the claim would not have been held liable if the action had been tried.

29. It may be said that this might lead to collusive settlements, between P and D1, that have no other object than the setting up of contribution proceedings against D2. To this there are, we think, two answers. The first is that it should not be permissible for D1 to claim a contribution unless he has conferred a benefit on D2 by settling the claim. It is implicit in the decision in Stott's case that the effect of the settlement was either to bar proceedings by P against D2 or at least to require that in such proceedings credit would be given for the £10,000 recovered from D1 under the settlement. If the settlement were a sham so that it did not operate to the benefit of D2 then clearly it should not be allowed to found a contribution claim. The second answer is that provided the settlement is not a sham and provided that D2 can be proved to be liable, the motive for making the settlement does not seem to us to be relevant. D1 cannot claim more in contribution proceedings than he is liable to pay under the settlement and D2 has the right to challenge the settlement figure as unreasonably high. Our provisional conclusion is that section 6 should be amended so as to allow contribution claims to be made after out of court settlements, whether or not the action against the claimant would have succeeded if taken to court. In the Republic of Ireland this is provided for by section 22 of the Irish Act.

"... who is, or would if sued have been, liable"

30. Great difficulties have been caused by the provision that the claimant tortfeasor "may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of that damage", and they prompted the High Court of Australia to comment[39] that section 6 of the 1935 Act "represents a piece of law reform which seems itself to call somewhat urgently for reform". The difficulties come under two headings:-

(a) At what moment in time must D1 show that D2 would have been liable if sued? At the time of the accident, or at the time of the trial of the contribution proceedings, or at any time, or what?

(b) What is the position if D2 has been sued and has been held not liable?

The time for ascertaining potential liability

31. The problem has usually arisen in cases in which P has not sued D2 and the limitation period for bringing proceedings against D2 has run out. In one of the earlier cases on the point, Merlihan v. A.C. Pope Ltd.[40] it was held that D1 could not claim a contribution from D2 if at the time of claiming it D2 would have had a defence under the Limitation Acts to proceedings by P. This had a certain logic about it but it was highly inconvenient as D1 had no way of compelling P to start proceedings gainst D2 within the limitation period. In order to preserve his contribution rights in respect of a claim that might never be made D1 therefore had to take proceedings within the limitation period for a declaration that he would be entitled to a contribution if he himself were later

39. In Bitumen and Oil Refineries (Australia) Ltd. v. Commissioner for Government Transport (1955) 92 C.L.R. 211.

40. [1946] K.B. 166.

sued by P[41]. Conflicting opinions were later given by the members of the Court of Appeal and of the House of Lords in the case of Geo. Wimpey & Co. Ltd. v. B.O.A.C.[42] but it is not proposed to analyse them in detail since the balance of authority now clearly favours the view that if D2 has not in fact been sued by P then it is sufficient to show that D2 would have been liable to P if sued at any time, or, as Lord Reid suggested, "at the time most favourable to the plaintiff"[43]. The reasoning adopted by McNair J. in Harvey v. G. O'Dell Ltd.[44] was that the limitation period relevant to contribution proceedings should not start to run until the liability of D1 had been finalised either by judgment or by out of court settlement, and this view has now been given statutory force by section 4(2) of the Limitation Act 1963. This Act also provides that the limitation period for contribution proceedings should be a period of two years[45].

32. From the point of view of D1 this may be satisfactory but from the point of view of D2 it seems less than fair. The limitation period for actions for damages for personal injuries is three years[46] and a possible defendant may reasonably suppose, if not sued within that time, that he need not prepare himself for proceedings, although he would be wise to allow a further year to elapse before concluding that he was safe because a writ issued within the three years period does not have to be served for a further period of up to twelve months[47]. The possibility of having to litigate the same issues in contribution proceedings however may haunt him for many further years. To take an extreme case,

41. Hordern-Richmond Ltd. v. Duncan [1947] K.B. 545.

42. The decision of the Court of Appeal is reported as Littlewood v. George Wimpey & Co. Ltd. [1953] 2 Q.B. 501, and the decision of the House of Lords is reported as Geo. Wimpey & Co. Ltd. v. B.O.A.C. [1955] A.C. 169.

43. Geo. Wimpey & Co. Ltd. v. B.O.A.C. [1955] A.C. 169, 190.

44. [1958] 2 Q.B. 78, 107-110.

45. Section 4(1).

46. By section 2(1) of the Law Reform (Limitation of Actions, &c.) Act 1954.

47. R.S.C. O. 6, r. 8(1).

P may sue D1 for damages for personal injury and not obtain judgment for 6 or 7 years: this is because he need not issue his writ until nearly 3 years are up and then need not serve it for a further 364 days, and a further period of 3 years may elapse in making preparations for trial and obtaining a date for hearing. When the trial is over - perhaps 7 years after the accident - D1 has another 2 years in which to decide whether to issue a writ claiming a contribution and, if it is issued, he need not serve it for a further 364 days. It may thus happen that D2's first intimation of a contribution claim does not reach him until over 9 years after the accident by which time he may have forgotten what really happened and may be unable to trace vital witnesses. In their report in 1962, the Committee on Limitation of Actions in Cases of Personal Injury[48] considered the problem but made no specific recommendations for dealing with it.

33. We have not formulated any provisional recommendation for the solution of this particular problem because (a) we have no basis for saying that the present law works unjustly in practice - it may be that the theoretical difficulty that we have posed never arises - and (b) the reform of the law relating to limitation periods is the immediate concern of the Law Reform Committee. We should welcome information on the way in which the provisions of the Limitation Act 1963 have worked. If readers know of cases in which events followed the pattern described in paragraph 32 we should be most interested. If, on the other hand, it is the general experience of practitioners that the limitation period for contribution claims works reasonably in practice this information would be most useful. There are at least two other ways of solving the

48. Cmnd. 1829. Paragraph 43 reads "We do, however, consider that our proposals would have a direct effect on a defendant seeking contribution from a joint tortfeasor and that this effect ought to be taken into consideration in any legislation implementing our recommendations. Having examined the problem to the best of our ability we do not feel able to make any specific recommendations because the question of applying the Limitation Act to a claim for contribution is not, in our view, within our terms of reference."

problem, if the present law is unsatisfactory, and we are therefore using this paper to canvass views on (a) the need for change and (b) the merits of the alternative solutions, in the hope that consultation on these points will be of assistance to the Law Reform Committee.

34. One alternative solution is to be found in sections 34 and 35(1)(i) of the Irish Act. These sections provide that where P's damage has been caused by D1 and D2 but P's claim against D2 has become barred by lapse of time, P's claim should be reduced vis-a-vis D1 by the amount that D1 would have obtained from D2 in contribution proceedings if D2 had been sued within time. If, for instance, P is injured in a motor accident for which her husband, D2, and another driver, D1, are equally to blame, she may seek to recover damages from D1 alone, and if it is then too late for P to sue D2, the Irish Act provides that D1 only has to pay his own share of the damages, i.e. P's claim is reduced by the amount of her husband's share. It may seem fair on these facts that the person penalised for the delay in bringing proceedings against D2 should be P rather than D1 or D2. There may, however, be other situations in which it would be unfair to penalise P in this way. For instance, P may have been injured while working on a building site and may have the right to sue many different people for his injuries, including (a) his employer, (b) the occupier of the site, (c) the architect, (d) the person who supplied the building materials, (e) the person who supplied the equipment and (f) other persons engaged at the site, such as electricians, carpenters, plumbers etc. It would surely be unreasonable to expect P, or his widow if he has been killed, to search out and sue every person who might be liable. P may not have evidence of liability against more than one of them and may indeed be unaware of the existence of some of them, yet by the provisions of the Irish Act his damages will be reduced by the amount which any person not sued would have had to contribute if he had been sued. We doubt whether this solution would work more fairly in practice than the provisions of the present law.

35. Another solution might be to put the clock back to the decision in 1946 in Merlihan v. A.C. Pope Ltd.[49], and to allow D2 to rely on the same limitation period vis-a-vis D1 as applied to P's right of action against D2, thus putting the onus on D1 of starting contribution proceedings before P's time for suing D2 ran out. As a gloss on this general rule it might be provided that D2 should not be allowed to plead the limitation period as a defence to a contribution on claim where D1 had started contribution proceedings within a prescribed period - we would suggest something less than a year - of being served with P's writ. This would protect the contribution rights of the defendant who was not served with P's writ until the limitation period was already up, but it would prevent D1 from delaying his claim for contribution until after the proceedings against him had reached a conclusion. Comments are invited.

The finding of non-liability in favour of D2

36. Another difficulty caused by the words "who is, or would if sued have been, liable" arises when D2 has been sued by P and held not liable. It was decided bya majority of the House of Lords in Geo. Wimpey & Co. Ltd. v. B.O.A.C.[50] that D2 could not be ordered to pay a contribution to D1 if D2 had been held not liable to P in proceedings brought against D2 by P. In that particular case D2 had defeated P's claim by a defence based on the Statute of Limitations, so D1's claim for a contribution from D2 was dismissed.

37. A similar problem was considered by the Court of Appeal in Hart v. Hall and Pickles Ltd.[51]. The court distinguished the decision of the House of Lords in the Geo. Wimpey case by holding that D2 could not defeat a claim for contribution by showing that P's claim against him had been dismissed for want of prosecution or that it had been struck out for some other reason without a trial on the merits.

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49. [1946] K.B. 166. See para. 31 above.

50. [1955] A.C. 169. See the speeches of Viscount Simonds; and Lords Tucker and Reid; Lords Keith and Porter dissented.

51. [1969] 1 Q.B. 405.

38. We think that the situation left by the decision on this point in the Geo. Wimpey case is unsatisfactory. P's claim against D2 was dismissed because it was 'time-barred' so D1's claim for a contribution from D2 was dismissed too. If however P had never sued D2 at all then on the present state of the law[52] D1's claim for a contribution would have succeeded! Our provisional conclusion is that, as against D1, D2 ought to be no better off if P's proceedings against D2 fail on a 'limitation' point than if they are never brought: this conclusion would need revision if the Irish Act solution, mooted in paragraph 34, were adopted.

39. A case can be made for allowing D1 to reopen the question of D2's liability to P for the purpose of contribution proceedings even when D2 has defeated P's claim on the merits, although this is not the present law. If D1 were not a party to the proceedings in which P's claim against D2 was dismissed on the merits, why, it might be asked, should he be bound by the judgment? He might have better evidence of D2's liability than P did and if so why should he have to pay the whole of P's claim when he can prove that D2 was also partly to blame?

40. The position in the Republic of Ireland, as a result of the legislation in 1961, is a little complicated. Section 29(5) of the Irish Act provides that D1 is bound by the decision in D2's favour unless it was obtained collusively, or as the Irish Act puts it, "in fraud of the claimant". There is a further proviso that D1 is not bound by a judgment in D2's favour if it was obtained in proceedings outside the Republic of Ireland "unless by the law of the court the claimant[53] had an opportunity of presenting evidence against the contributor[54], of appealing against a judgment in his favour and of contesting an appeal by him." The Act goes on to provide, by section 35(1)(j) that if in P's subsequent proceedings against D1, D1 proves that D2 really was liable

52. See para. 31 above.
53. i.e. D1.
54. i.e. D2.

all along, P's claim must be reduced by the amount that D1 would otherwise have obtained from D2 by way of contribution. These provisions may sometimes work fairly but again we doubt whether they will do so in every case. For example D1 may, unknown to P, have vital evidence of D2's liability in his possession, and P's claim against D2 may fail, for the lack of it. Should D1 then be able to use that evidence to reduce the amount of his own liability? Our provisional view is that this would be unfair to P and that a fresh approach is required.

41. It seems to us that the problem comes down to a straight choice. Is it more important, for the purpose of doing justice between D1 and D2, that D2 should be saved from having to defend himself twice on the issue of liability or that D1 should be given the chance of proving that the earlier decision in D2's favour was wrong? This is a question on which we would value opinions, but our provisional view is that it is on balance better that D1 should be bound by the judgment in D2's favour, provided that it was arrived at after a hearing on the merits. By "a hearing on the merits" we do not intend to cover a judgment on a pleading point, nor on a 'limitation' point, nor a judgment collusively obtained.

Contribution orders

42. For completeness we ought to mention the sort of order that the court may make in contribution proceedings between tortfeasors under section 6 of the 1935 Act. It may exempt a defendant from a liability for a contribution or may order him to give a contribution amounting to a total indemnity. Otherwise its jurisdiction is to order D2 to pay D1 such amount as may be "just and equitable having regard to the extent of that person's responsibility for the damage". It is not clear from the decisions whether "responsibility" means responsibility in terms of culpability or of causation, but probably both are to be taken into account[55]. The losss is usually apportioned between defendants on a percentage basis and we

55. See Street, The Law of Torts (5th ed., 1972) pp. 478-9 and cases there cited.

think that this is satisfactory. Our provisional view is that the same approach could be conveniently applied to all contribution proceedings involving damages, whether the defendants are contractors, tortfeasors or trustees.

Enforcement of contribution orders

43. At common law a contribution could not be claimed by D1 until he had actually made payment to P. This rule was mitigated by equity and was entirely overridden by section 6 of the 1935 Act. It might therefore appear that D1 could obtain his contribution from D2 under the 1935 Act before satisfying P's claim, and thus leave D2 at the risk of having to pay P as well. This would be very unjust but it has been provided by Order 16, rule 7(2) of the Rules of the Supreme Court that D1 may not execute a judgment against D2 without the leave of the ourt until P's judgment has been satisfied[56]. This seems to us to work satisfactorily in practice, but we would welcome the views of others.

PART IV - POSSIBLE REFORMS

44. The 1935 Act created legal machinery for dealing with contribution claims between tortfeasors. It is not completely satisfactory, and in Part III we suggested improvements that could be made, but in its essentials the machinery seems to us to be sound. Should the courts now be empowered to us substantially the same machinery for all contribution claims? To answer this question we return to the analysis of the common law position that we made in Part II.

45. Our appraisal of the common law rights of contribution can be summarised as follows:-

(a) When D1 and D2 are each liable to P in respect of the use debt each has well-

56. Order 12, rule 3 of the County Court Rules 1936 makes a similar provision for proceedings in the county court.

settled rights of contribution at common law. Our provisional view is that there should not be disturbed[57].

(b) When D1 has paid P a debt or damages for which D2 is primarily liable D1 has a right to be indemnified by D2. Our provisional view is that where this right exists at common law it should be preserved[58].

(c) When D1 and D2 are each liable in damages to P for breach of the same obligation the court may apportion the loss between them as if they were co-debtors. Our provisional view is that the common law remedy is not sufficiently flexible and that the court should have the power to make an apportionment that takes into account the part played by each defendant in the circumstances giving rise to the claim[59].

(d) The court has no power to apportion the loss between D1 and D2 at common law, except as provided in (c), and therefore cannot apportion the loss where D1 and D2 are not liable to the same demand, e.g. where each is liable on a separate contract, or one is liable in contract and the other in tort, or one is liable for breach of trust and the other is liable in contract or tort. Our provisional view is that the court should be given the power to apportion the loss between D1 and D2 in these situations[60].

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57. Paras. 19 and 20 above.
58. Paras. 16, 17 and 18 above.
59. Para. 20 above.
60. Paras. 21, 22 and 23 above.

46. On the face of it the defects in the common law would all be cured by widening the present statutory rights of contribution to cover not only tortfeasors but also those liable in damages for breach of contract, breach of trust or other breach of duty. Remedies in contract or trust law are however different in many respects from remedies in tort and these differences could lead to complications if contribution proceedings were to be allowed between person liable in tort and persons liable for breach of contract, trust or other duty. The principal relevant differences seem to be these:-

(a) The rules of remoteness of damager are not exactly the same in contract as in tort, and so the amount recoverable by the plaintiff from a contract-breaker will not necessarily be the same as the amount recoverable from a tortfeasor.

(b) The Limitation Acts work differently in their application to breaches of contract, breaches of trust and tort.

(c) The liability of a contract-breaker may be limited to a certain figure by a clause in his contract. The tortfeasor's liability is less likely to be so limited[61].

(d) The tortfeasor may reduce his liability to the plaintiff by proving contributory negligence. Such a partial defence is not available to a contract-breaker.

We shall examine these differences in turn to see whether they can be accommodated in an enlarged statutory jurisdiction.

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61. It may however be limited under the present law by statute: see, e.g. Nuclear Installations Act 1965, s. 16(1).

Remoteness of Damage

47. Differences in the rules relating to remoteness of damage are unlikely to cause difficulties. It is possible, but unusual, for one defendant to be liable to compensate a plaintiff for more items of damage than another defendant, but this could happen even if both were tortfeasors. The 1935 Act makes it a requirement that both D1 and D2 must be liable in respect of the same damage, and we understand this to mean that if they are liable for different items of damage the contribution may only be claimed in respect of the items common to the two claims. It is possible that one defendant may compound his liability by an out of court settlement and that the settlement figure may not be the same as the figure decided by the court that tries the contribution proceedings. This again is not really a problem because it is clear from Stott v. West Yorkshire Road Car Co. Ltd.[62] that if D2 is not a party to the settlement he is not bound by the settlement figure and may challenge it as excessive. Conversely D2 cannot rely on the out of court settlement that he has arrived at with the plaintiff as a defence to a contribution claim nor as setting a limit on his liability to D1 because the court must consider for what damages D2 would have been liable if sued[63]. The only relevance of the settlement figure is therefore that it sets a limit on the sum which the "settling" defendant can claim by way of contribution.

The Limitation Acts

48. The Limitation Acts do not apply in the same way to all defendants. The period in which an action may be brought for fraud is six years from the discovery of the fraud, but for a fraudulent breach of trust by a trustee no time limit is set[64],

62. [1971] 2 Q.B. 651.

63. This is the wording of section 6(1)(c) of the 1935 Act.

64. Compare sections 2(1)(a) and 26 of the Limitation Act 1939 with section 19(1)(a).

and time starts to run for a breach of contract from the date of breach whereas in some torts it runs from the date of damage[65]. Furthermore special periods are set for actions on certain kinds of contract[66] and for certain claims in tort[67]. These different rules produce anomalies in the general law which carry over into the law of contribution but we do not think that any additional anomalies will be produced by enlarging the statutory jurisdiction in contribution claims. The relevance of limitation periods to contribution claims was considered in Part III[68].

Upper Limits

49. This problem is most easily illustrated by adding an 'upper limit' clause to the facts of a hypothetical situation that we have previously outlined:-[69]

> P buys a car from D1 which has a latent defect in its electrical system. As he is driving it one night the headlights suddenly go out and he runs into an obstruction in the highway that D2 has negligently left unlit. P sues D1 and D2. There is a clause in the contract between P and D1 that sets a ceiling of £400 on any claim that P may make for breach of contract.

Assuming, for the sake of the example, that the clause is binding, notwithstanding the provisions of the Supply of Goods (Implied Terms) Act 1973[70], that the damage caused by the accident amounts to £1,000 and that D1 and D2 are held equally

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65. See Bagot v. Stevens Scanlan & Co. Ltd. [1966] 1 Q.B. 197.

66. See for example Article 49 of Schedule 1 to the Uniform Laws on International Sales Act 1967.

67. Different limitation periods applied to claims in tort against D1 and D2 in Geo. Wimpey & Co. Ltd. v. B.O.A.C. [1955] A.C. 169.

68. Paras. 31 to 35 above.

69. In para. 22(b) above.

70. Let us say that P buys it in the course of a business and it would be fair and reasonable to allow D1 to rely on the clause. See section 55(4) of the Sale of Goods Act 1893 as enacted by section 4 of the 1973 Act.

to blame, how should the loss be apportioned between them?

50. There are at least three possible solutions that should be considered.

Solution 1 — One solution might be that D1 should pay P £400, D2 should pay £500 and the balance of £100 should be irrecoverable from either[71].

Solution 2 — The contribution proceedings might be confined to the amount by which the two claims overlap (£400), leaving D2 to pay the balance. The overall result would be that D1 would bear £200 of the loss and D2 £800.

Solution 3 — The loss of £1,000 might be divided equally between D1 and D2, subject to the limit on the amount of D1's overall liability set by the clause in the contract. The result would be that D1 would bear £400 and D2 £600.

51. We would welcome views on these possible solutions and any other solutions that may be devised. The first one seems to open to the criticism that it benefits D2 unduly at the expense of P. It means that P is worse off by reason of D1's breach of contract than he would be if he had no claim against him at all. The second solution seems to be unduly favourable to D1 as he has caused £1,000 worth of damage for which he was ready to assume liability up to £400, but at the end of the day has

71. See section 35(1)(g) of the Irish Act.

his liability further reduced to £200. The third solution seems to us to give the fairest result all round. We therefore make the provisional proposal that the upper limit fixed by contract should operate as a cut-off point after the loss has been apportioned rather than before.

Contributory Negligence

52. This is very similar to the 'upper limit' problem. Let us take the same situation of P driving into an unlit obstruction but let us suppose that it could be shown that he was driving negligently and, vis-a-vis the tortfeasor D2, 40% to blame for his injuries. If he were to sue D2 alone he would recover £600. If he were to sue the person who sold him the car, D1, and were able to prove a breach of the contract of sale, he would recover either nothing or the full £1,000, assuming that the contract did not include an 'upper limit' clause. If he sued both and the court were to hold D1 and D2 equally to blame as between themselves, how should the loss be apportioned between them?

53. There are again at least three possible solutions.

Solution 1 One solution might be to allow D1 to plead contributory negligence as a partial defence to breach of contract[72]. Then P would recover £300 from D1 and £300 from D2.

Solution 2 The contribution proceedings might be confined to the amount by which the two claims overlap (£600) leaving D1 to bear the balance. The result would be that D1 would bear £700 of the loss and D2 £300.

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72. See section 34(1) of the Irish Act, and the definition of "wrong" stated in section 2(1).

Solution 3 The loss of £1,000 might be divided equally between D1 and D2 subject to the limit on the amount of D2's overall liability set by the figure for which he would have been liable if sued alone i.e. £600. On the facts given, D2's share would not exceed the amount for which he would be liable if sued alone so the result would be that D1 and D2 would bear £500 each. If P had been 60% to blame, D2 would be liable, on this approach, to make a contribution of £400.

54. The first solution seems to be the most obviously just in its result but unfortunately it could only be achieved in English law by altering sections 1(1) and 4 of the Law Reform (Contributory Negligence) Act 1945 so as to allow contributory negligence to be pleaded as a partial defence not only to claims in tort but also to claims for breach of contract. It may seem strange that a plaintiff who has suffered personal injuries may in some situations recover damages in full if he ca prove a breach of contract against a defendant but may suffer a reduction for contributory negligence if he proves a tort. This however appears to be the present law[73] and it cannot be changed without causing repercussions outside the law of contribution which we cannot conveniently deal with in the present paper. We must therefore accept that this anomaly in the law of contributory negligence will mean that D1 must be worse off than D2 vis-a-vis the plaintiff, P. If solution 3 is chosen the disparity will be reduced - as between D1 and D2 - whereas if solution 2 is chosen, the disparity will be increased Our provisional view is that solution 3 is to be preferred.

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73. cf. Quinn v. Burch Bros. (Builders) Ltd. [1966] 2 Q.B. 370, affirmed on different reasoning [1966] 2 Q.B. at p. 381.

55. After ranging widely over the law of contribution we have reached the provisional conclusion that all its present defects, at common law and by statute, can be cured by enlarging the court's statutory jurisdiction to make contribution orders, and by making provision for the particular difficulties considered in Part III. We are therefore putting forward a series of provisional recommendations for the reform of the law of contribution. They do not represent concluded views but are offered for consideration and discussion. We invite comments on the points that we have raised and on any related points that may not have been dealt with expressly.

56. We should also like to know whether the present limitation period for contribution proceedings causes hardship or injustice in practice. Information on this point and comments on the alternative solutions proposed would be welcome[74].

PROVISIONAL RECOMMENDATIONS

(a) The statutory jurisdiction to make contribution orders should not be limited to situations in which the claims arise out of tort but should be widened to cover breaches of contract, breaches of trust and other breaches of duty as well. (paragraphs 19 to 23, 42 and 45)

(b) Where a plaintiff has a civil claim for damages, anyone who is liable to him in respect of such a claim or upon a compromise of it (hereinafter called 'the claimant') should be entitled to claim a contribution in respect of the sum for which he is liable from the person mentioned in (c). (paragraphs 26 to 29)

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74. See paras. 31-35 above.

(c) A contribution under (b) may be claimed from any other person who is or would, if sued at the time most favourable to the plaintiff, have been liable in respect of the same damages (hereinafter called 'the contributor'). (paragraphs 30 to 35)

(d) No such contribution should be claimed unless the satisfaction of the plaintiff's claim against the claimant, if effected at a time when the contributor was also liable, would have satisfied or reduced the plaintiff's claim against the contributor. (paragraphs 28 and 29)

(e) For the purposes of contribution proceedings between claimant and contributor neither should be allowed to challenge a finding on non-liability made in favour of the other in proceedings brought against the other by the plaintiff, provided that the finding was made after a trial on the merits and that the finding of non-liability was not based on the provisions of the Limitation Acts. (paragraphs 36 to 41)

(f) The amount recoverable from a contributor in contribution proceedings should be such as may be found by the court to be just and equitable having regard to the contributor's responsibility for the damage, and the court should have power to exempt either party from liability to make a contribution or to direct that the contribution to be recovered from the contributor should amount to a complete indemnity of the claimant. (paragraphs 42 and 43 and section 6(2) of the 1935 Act)

(g) The sum the court may order by way of contribution should not exceed the maximum for which the contributor could be held liable to the plaintiff having regard to any financial limit set by statute or by a term in a contract made between the plaintiff and the contributor before the breach of duty and having regard also to any contributory negligence on the part of the plaintiff. (paragraphs 49 to 54)

(h) A judgment recovered against a person liable jointly with another in respect of a contract debt or breach of contract, trust or other duty, should not be a bar to an action against that other person but the amount recoverable from such persons should not in the aggregate exceed the amount awarded by the judgment first given. (paragraph 24)

APPENDIX

THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT 1935

PART II

PROCEEDINGS AGAINST AND CONTRIBUTION BETWEEN TORTFEASORS

6. Proceedings against, and contribution between joint and several tortfeasors

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not):-

(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the [dependants][75] of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs

75. As amended by the Fatal Accidents Act 1959, s. 1(4).

unless the court is of opinion that there was reasonable ground for bringing the action;

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recogerable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) For the purposes of this section:-

(a) [the expression "dependants" mean the persons for whose benefit actions may be brought under the Fatal Accidents Acts 1846 to 1959;][76] and

(b) the reference in this section to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is

76. As amended by the Fatal Accidents Act 1959, s.1(4).

not so reversed and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

(4) Nothing in this section shall:-

(a) apply with respect to any tort committed before the commencement of this Part of this Act; or

(b) affect any criminal proceedings against any person in respect of any wrongful act; or

(c) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

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